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In the Supreme Court of the United States

OCTOBER TERM, 1996

KENTUCKY STATE POLICE DEPARTMENT, ET AL.,
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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This supplemental brief is filed pursuant to Rule 25.5 of the Rules of this Court to bring to the attention of the Court legislation that was enacted the date that the brief in opposition was filed in this case.

1. On September 30, 1996, Congress enacted and the President signed into law the Age Discrimination in Employment Amendments of 1996 (1996 Amendments) as Division A, § 101(a), Tit. I, § 119 of the Department of Defense Appropriations Act, 1997, Pub. L. 104-208 (110 Stat. 3009; 142 Cong. Rec. H11,651 (daily ed. Sept. 28, 1996).[1] Subsection 1 of the 1996 Amend-

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[1] The text of the 1996 Amendments is set forth at App., *infra*, 1a-5a. Bracketed cross-references in the Appendix re-

ments reenacts and amends Section 4(j) of the Age Discrimination in Employment Act of 1967 (ADEA), which permitted state and local governments to use age limitations when making hiring and discharge decisions regarding law enforcement officers and firefighters, as long as those limitations were in effect under state or local law on March 3, 1983. Pet. App. 77. Section 4(j) was originally added to the ADEA by the Age Discrimination in Employment Amendments of 1986 and took effect on January 1, 1987, but expired on December 31, 1993. See Pet. App. 77-79. In addition to reenacting the Section 4(j) exemption, Subsection 1(a) of the 1996 Amendments repeals the repealer of Section 4(j). App., *infra*, 1a. Subsection 3(b) of the 1996 Amendments makes the reenacted Section 4(j) effective from December 31, 1993, onward. App., *infra*, 5a.[2]

Subsection 1(b)(2), like the original Section 4(j), allows state and local governments to make hiring and discharge decisions pursuant to laws setting age caps for police officers and firefighters, provided the age limit was in effect under state or local law on March 3, 1983. App., *infra*, 1a. Subsection 1(b)(2) also expands Section 4(j) to allow age-based decisions made pursuant to a state or local law enacted after the enactment of the 1996 Amendments on September 30,

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flect technical corrections to the version appearing in the daily edition of the *Congressional Record*.

[2] Neither the original Section 4(j) exemption nor the new Section 4(j) applies to the present case because this case was filed in August 1984, prior to the effective date of either version. The original Section 4(j) exemption did not apply to causes of actions arising before January 1, 1987 (Pet. App. 78), and the reenacted Section 4(j) is only effective as of December 31, 1993 (App., *infra*, 5a).

1996. App., *infra*, 1a-2a. Subsection 1(b)(2) provides, however, that officers and firefighters may not be discharged before age 55 under mandatory retirement laws adopted after enactment of the 1996 Amendments. *Ibid.*[3] Thus, the 1996 Amendments provide that age-based hiring and discharge decisions made with respect to officers or firefighters after January 1, 1987, are permissible under the ADEA, without regard to whether age is a bona fide occupational qualification, as long as the action was taken pursuant to a statutory age-cap that is no lower than one in effect under applicable state or local law on March 3, 1983, or that was enacted under a state or local law after September 30, 1996, as long as the officer was not discharged prior to age 55.[4]

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[3] Section 4(j), as amended by the 1996 Amendments, is set forth at App., *infra*, 6a-7a.

[4] The amended Section 4(j) also requires that employers comply with Subsection 2(d)(2) of the 1996 Amendments, which requires the use of certain job performance tests by employers seeking an exemption under Section 4(j). Subsection 2(c) requires the Secretary of Health and Human Services, not later than four years after September 30, 1996, to develop and issue "advisory guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of law enforcement officers and firefighters to perform the requirements of the jobs of the officers and firefighters." App., *infra*, 4a. After issuance of those guidelines, Subsection 2(d)(1) requires the Secretary to "issue regulations identifying valid, nondiscriminatory job performance tests that shall be used by employers seeking the exemption described in section 4(j)." App., *infra*, 4a. Effective on the date of issuance of those regulations, Subsection 2(d)(2) provides that employers seeking an exemption under Section 4(j) "shall provide to each firefighter or law enforcement officer who has attained [an age of retirement under Section 4(j)] an annual opportunity to demonstrate physical and mental fitness by passing a test described

2. The first question presented for review in this case is whether the court of appeals correctly held that the Kentucky State Police Department failed to show that mandatory retirement at age 55 for police officers was justified as a "bona fide occupational qualification" under Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1) (1982 & Supp. IV 1986). Petitioners filed their brief seeking certiorari before Congress enacted the 1996 Amendments. That legislation has rendered incorrect the premise of petitioners' contention (Pet. 19) that review of the court of appeals' 1988 decision in *KSP I* would now be appropriate because Section 4(j) expired in 1993. Thus, in light of the legislative reinstatement of Section 4(j), coupled with the additional (and new) approach when Subsection 2(d)(2) is implemented (see note 4, *supra*), the question of how state and local governments may have proved in the past that age is a bona fide occupational qualification for police officers is an issue of limited and diminishing importance.

Respectfully submitted.

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in [Subsection 2(d)(1)], in order to continue employment." App., *infra*, 4a.

APPENDIX

1. The Age Discrimination in Employment Amendments of 1996, Pub. L. No. 104-208, Div. A, § 101(a), Tit. I, § 119 (110 Stat. 3009) (Sept. 30, 1996) provides:

Subsection 1. Age Discrimination Amendment

(a) REPEAL OF REPEALER.—Section 3(b) of the Age Discrimination in Employment Amendments of 1986 (29 U.S.C. 623 note) is repealed.

(b) EXEMPTION.—Section 4(j) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(j)), as in effect immediately before December 31, 1993—

(1) is reenacted as such section; and

(2) as so reenacted, is amended in paragraph (1) by striking "and the individual has attained the age" and all that follows through "1983, and" and inserting the following: ", the employer has complied with [Sub]section [2](d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such [Sub]section, and the individual has attained—

"(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

"(B)(i) if the individual was not hired, the age or hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after the date of enactment of the Age Discrimination in Employment Amendments of 1996; or

"(ii) if applicable State or local law was enacted after the date of enactment of the Age Discrimination

in Employment Amendments of 1996 and the individual was discharged, the higher of—

"(I) the age of retirement in effect on the date of such discharge under such law; and

"(II) age 55; and".

(c) CONSTRUCTION.—Nothing in the repeal, reenactment, and amendment made by subsections (a) and (b) shall be construed to make lawful the failure or refusal to hire, or the discharge of, an individual pursuant to a law that—

(1) was enacted after March 3, 1983 and before the date of enactment of the Age Discrimination in Employment Amendments of 1996; and

(2) lowered the age of hiring or retirement, respectively, for firefighters or law enforcement officers that was in effect under applicable State of local law on March 3, 1983.

Subsection 2. Study and Guidelines for Performance Tests

(a) STUDY.—Not later than 3 years after the date of enactment of this Act, the Secretary of Health and Human Services, acting through the Director of the National Institute for Occupational Safety and Health (referred to in this section as the "Secretary"), shall conduct, directly or by contract, a study, and shall submit to the appropriate committees of Congress a report based on the results of the study that shall include—

(1) a list and description of all tests available for the assessment of abilities important for the completion of public safety tasks performed by laws enforcement officers and firefighters.

(2) a list of the public safety tasks for which adequate tests described in paragraph (1) do not exist;

"(3) a description of the technical characteristics that the tests shall meet to be in compliance with applicable Federal civil rights law and policies;

(4) a description of the alternative methods that are available for determining minimally acceptable performance standards on the tests;

(5) a description of the administrative standards that should be met in the administration, scoring, and score interpretation of the tests; and

(6) an examination of the extent to which the tests are cost-effective, are safe, and comply with the Federal civil rights law and policies.

(b) CONSULTATION REQUIREMENT; OPPORTUNITY FOR PUBLIC COMMENT.—

(1) CONSULTATION.—The Secretary shall, during the conduct of the study required by subsection (a), consult with—

(A) the Deputy Administration of the United States Fire Administration;

(B) the Director of the Federal Emergency Management Agency;

(C) organizations that represent law enforcement officers, firefighters, and employers of the officers and firefighters; and

(D) organizations that represent older individuals.

(2) PUBLIC COMMENT.—Prior to issuing the advisory guidelines required in subsection ([c]), the Secretary shall provide an opportunity for public comment on the proposal [*sic*] advisory guidelines.

(c) ADVISORY GUIDELINES.—Not later than 4 years after the date of enactment of this Act, the Secretary shall develop and issue, based on the results of the study required by subsection (a), advisory guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of law enforcement officers and firefighters to perform the requirements of the jobs of the officers and firefighters.

(d) JOB PERFORMANCE TESTS.—

(1) IDENTIFICATION OF TESTS.—After issuance of the advisory guidelines described in subsection ([c]), the Secretary shall issue regulations identifying valid, nondiscriminatory job performance tests that shall be used by employers seeking the exemption described in section 4(j) of the Age Discrimination in Employment Act of 1967 with respect to firefighters or law enforcement officers who have attained an age of retirement described in such section 4(j).

(2) USE OF TESTS.—Effective on the date of issuance of the regulations described in paragraph (1), any employer seeking such exemption with respect to a firefighter or law enforcement officer who has attained such age shall provide to each firefighter or law enforcement officer who has attained such age an annual opportunity to demonstrate physical and mental fitness by passing a test described in paragraph (1), in order to continue employment.

(e) DEVELOPMENT OF STANDARDS FOR WELLNESS PROGRAMS.—Not later than 2 years after the date of enactment of this Act, the Secretary

shall propose advisory standards for wellness programs for law enforcement officers and firefighters.

(f) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated $5,000,000 to carry out this section.

Subsection 3. Effective Dates

(a) GENERAL EFFECTIVE DATE.—Except as provided in subsection (b), this title and the amendments made by this title shall take effect on the date of enactment of this Act.

(b) SPECIAL EFFECTIVE DATE.—The repeal made by [Subsection 1](a) and the reenactment made by [Subsection 1](b)(1) shall take effect on December 31, 1993.

2. Section 4(j) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623(j), as amended by Subsection 1 of the Age Discrimination in Employment Amendments of 1996, provides as follows:

> (j) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—
>
> (1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with [Sub]section [2](d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such [Sub]section, and the individual has attained—
>
> (A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or
>
> (B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after the date of enactment of the Age Discrimination in Employment Amendments of 1996; or
>
> (ii) if the applicable State or local law was enacted after the date of enactment of the Age Discrimination in Employment Amendments of 1996 and the individual was discharged, the higher of —

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.